TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1959

No. 556 14

UNITED STATES, APPELLANT,

vs.

LUCILLE ALDINE DEGE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FILED DECEMBER 4, 1958
PROBABLE JURISDICTION NOTED JANUARY 26, 1959

Supreme Court of the United States

OCTOBER TERM, 1958

No. 556

UNITED STATES, APPELLANT,

vs.

LUCILLE ALDINE DEGE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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[fol. 2] IN UNITED STATES COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

27809

THE UNITED STATES

vs.

LUCILLE ALDINE DEGE, ERNEST DEGE

18-371 Conspiracy 1 Ct.

DOCKET ENTRIES

8/21/58 Ent ord and fld Indict. O/R both defts. Md JS-2

8/25/58 Ent procs arr T/N each deft. T. Whelan atty. Ent plea N/G both defts. Ent ord contd to 9/8/58 10AM for hrg mots to be fld by deft by 8/28/58 & for settg. Fld waiver of defts presence (W)

9/2/58 Fld mot defts to dism indictment. Fld pts & auths in support of mot of defts.

9/5/58 Fld oppos pltf to mot to dism.

9/8/58 Ent proc hrg mot of ea deft to dismiss indict. Ent ord granted said motion. Ent ord atty for deft prepare and submit to court. (JC)

9/9/58 Fld Ord (TC) dismissing Indictment. Ent 9/12/58. Md JS-3 (JC)

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 3] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

July, 1958, Grand Jury—Southern Division

No. 27809

(U.S.C., Title 18, Sec. 371—Conspiracy)

UNITED STATES OF AMERICA, Plaintiff,

vs.

LUCILLE ALDINE DEGE and ERNEST DEGE, Defendants.

INDICTMENT—filed August 21, 1958

The Grand Jury charges:

Commencing in or around October, 1957, and continuing up to and including March, 1958, in San Diego, California, in the Southern Division of the Southern District of California, defendants LUCILLE ALDINE DEGE and her husband, ERNEST DEGE, did wilfully and unlawfully conspire and agree to commit offenses against the United States of America, in violation of United States Code, Title 18, Sections 371 and 545, in that defendants LUCILLE ALDINE DEGE and her husband, ERNEST DEGE, did conspire and agree together and with each other as follows:

1. The defendants LUCILLE ALDINE DEGE and her husband, ERNEST DEGE, would knowingly and wilfully with intent to defraud the United States, smuggle and clandestinely introduce into the United States merchandise, to-wit, various and sundry kinds of psittacine birds from a foreign country; namely, the Republic of Mexico, which merchandise should have been invoiced.

[fol. 4] 2. The defendants LUCILLE ALDINE DEGE and her husband, ERNEST DEGE, would knowingly and fraudulently import and bring into the United States from a foreign country; namely, Mexico, said merchandise con-

trary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

3. The defendants LUCILLE ALDINE DEGE and her husband, ERNEST DEGE, would knowingly and wilfully receive, conceal, sell and facilitate the transportation and concealment of said merchandise, which said merchandise was unlawfully imported and brought into the United States, contrary to United States Code, Title 19, Chapter 4, and particularly, Sections 1461 and 1484 thereof, knowing said merchandise would be and was so imported and so brought into the United States.

Pursuant to said conspiracy and to effect the objects thereof, the defendants LUCILLE ALDINE DEGE and her husband, ERNEST DEGE, did commit diverse overt acts in San Diego County within the Southern Division of the Southern District of California, and other places to the Grand Jury unknown, among which are the following:

1. On or about October 15, 1957, defendants LUCILLE ALDINE DEGE and her husband, ERNEST DEGE, drove from San Diego County, California, to Tijuana, Baja California, Mexico.

2. On or about October 15, 1957, defendant LUCILLE ALDINE DEGE received a number of psittacine birds in San Diego County, California.

3. On or about October 15, 1957, defendant LUCILLE ALDINE DEGE transported a number of psittacine birds from San Diego County to Los Angeles County, California.

4. On or about December 27, 1957, defendants LUCILLE ALDINE DEGE and her husband, ERNEST DEGE, drove from San Diego County, California, to Tijuana, Baja California, Mexico.

5. On or about December 27, 1957, defendant LUCILLE ALDINE DEGE received and transported a number of psittacine birds in San Diego County, California.

[fol. 5] 6. On or about January 15, 1958, defendants LUCILLE ALDINE DEGE and her husband, ERNEST DEGE, drove from San Diego County to Tijuana, Baja California, California.

7. On or about January 15, 1958, defendant LUCILLE ALDINE DEGE received and transported a number of psittacine birds in San Diego County.

8. On or about March 7, 1958, defendant ERNEST DEGE drove from San Diego County to Tijuana, Baja California, Mexico.

9. On or about March 7, 1958, defendants LUCILLE ALDINE DEGE and her husband, ERNEST DEGE, drove from Tecate, Baja California, Mexico to San Diego County, California.

10. On or about March 7, 1958, defendant LUCILLE ALDINE DEGE received and transported approximately 389 psittacine birds in San Diego County, California.

A TRUE BILL

/s/ FRANK W. HEILMAN
Foreman

/s/ LAUGHLIN E. WATERS
Laughlin E. Waters
United States Attorney

[fol. 6] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

July, 1958, Grand Jury—Southern Division

No. 27809

UNITED STATES OF AMERICA, Plaintiff,

vs.

LUCILLE ALDINE DEGE and ERNEST DEGE, Defendants.

MOTION TO DISMISS INDICTMENT—filed September 2, 1958

The defendant LUCILLE ALDINE DEGE and the defendant ERNEST DEGE, severally and jointly, and each defendant above-named individually moves that the Indictment in the above-entitled action be dismissed on the following grounds and for the following reasons:

I

That said Indictment does not state facts sufficient to constitute a cause of action against these defendants or either of them.

II

That said Indictment does not state a public offense against the United States.

DATED this 28th day of August, 1958.

/s/ THOMAS WHELAN
Thomas Whelan,
Attorney for Defendant
LUCILLE ALDINE DEGE
and Defendant
ERNEST DEGE

Acknowledgment of service (omitted in printing).

[fols. 7, 8, 9] • • •

[fol. 10] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

July, 1958, Grand Jury—Southern Division

No. 27809 - CR - SD

UNITED STATES OF AMERICA, Plaintiff,

vs.

LUCILLE ALDINE DEGE and ERNEST DEGE, Defendants.

ORDER DISMISSING INDICTMENT—September 8, 1958

In the above-entitled action the motion of LUCILLE ALDINE DEGE and the motion of ERNEST DEGE, defendants therein, that the Indictment be dismissed on the following grounds and for the following reasons:

That said Indictment does not state facts sufficient to constitute a cause of action against these defendants or either of them;

That said Indictment does not state a public offense against the United States;

came on regularly to be heard on Monday, September 8th, 1958, at 10:00 o'clock A.M., in the above-entitled Court in Courtroom Two, located at the Federal Building at 325 West "F" Street, San Diego, California, the Honorable James Carter, a Judge of the above-entitled Court presiding, the United States of America, plaintiff, being represented by Peter J. Hughes, Assistant United States Attorney, and the defendants Lucille Aldine Dege and Ernest Dege, being represented by their attorneys of rec-

[fol. 11] ord with Thomas Whelan appearing, and said Motions of said defendants having been presented, and the same being submitted to the Court for decision and the Court being fully advised in the premises:

IT IS HEREBY ORDERED on the authority of *Dawson vs United States*, 10 Fed 2d, 106, and *Gros vs United*

States, 138 Fed 2d, 261, that the motion of each defendant is granted, and the Indictment against the defendants is dismissed as to each defendant.

DONE IN OPEN COURT this 8th day of September, 1958.

/s/ JAMES M. CARTER
Judge of the United States
District Court

Approved as to form
Peter J. Hughes
Assistant U.S. Attorney

[fol. 12] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 27809 Criminal

UNITED STATES OF AMERICA, Plaintiff

v.

LUCILLE ALDINE DEGE and ERNEST DEGE, Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—filed October 7, 1958

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the order of September 8, 1957, dismissing the indictment which charged defendants with a conspiracy in violation of 18 U.S.C. 371.

The appeal is taken pursuant to 18 U.S.C. 3731.

II. The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the

Supreme Court of the United States and include in said transcript the following:

1. Transcript of docket entries.
2. Indictment.
3. Motion to dismiss the indictment.
4. Order of September 8, 1958 dismissing the indictment.
5. This notice of appeal.

[fol. 13] III The following question is presented by this appeal:

Whether 18 U.S.C. 371, punishing conspiracy of two or more persons to commit an offense against the United States covers a conspiracy between husband and wife.

/s/ LAUGHLIN E. WATERS
Laughlin E. Waters
United States Attorney
Southern District of California

[fol. 14] • • •

[fol. 15] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 16]

SUPREME COURT OF THE UNITED STATES

No. 556—October Term, 1958

UNITED STATES, Appellant,

vs.

LUCILLE ALDINE DEGE ET AL.

APPEAL from the United States District Court for the Southern District of California.

ORDER NOTING PROBABLE JURISDICTION—January 26, 1959

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1959 499042 1150

FILE COPY

No. 14

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, APPELLANT

v.

LUCILLE ALDINE DEGE AND ERNEST DEGE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice, Washington 25, D. C.

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489105—58

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

LUCILLE ALDINE DEGE AND ERNEST DEGE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The order of the district court dismissing the indictment is not reported. A copy is annexed hereto.

JURISDICTION

The order of the district court dismissing the indictment on the ground that it does not state an offense under 18 U. S. C. 371 was entered on September 8, 1958. Notice of appeal to this Court was filed in the district court on October 7, 1958. The jurisdiction of this Court to review, on direct appeal, a judgment dismissing an indictment, because of a construction of the statute on which the indictment is founded, is conferred by 18 U, S. C. 3731.

STATUTE INVOLVED

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

QUESTION PRESENTED

Whether 18 U. S. C. 371, punishing conspiracy of two or more persons to commit an offense against the United States, covers a conspiracy between husband and wife.

STATEMENT

The indictment charged that petitioners, who are husband and wife, conspired with each other to smuggle and illegally import into the United States psittacine birds, and to conceal and transport the birds after illegal importation. Petitioners moved to dismiss on the ground that the indictment failed to charge an offense. The district court dismissed the indictment on the authority of *Dawson* v. *United States*, 10 F. 2d 106, certiorari denied, 271 U. S. 687,[1] and *Gros* v. *United States*, 138 F. 2d 261, two decisions of the Ninth Circuit to the effect that a husband

[1] Certiorari had been sought on other grounds by the defendants whose convictions on substantive counts had been affirmed.

and wife are incapable of engaging in a criminal conspiracy.

THE QUESTION IS SUBSTANTIAL

The district court, under the compulsion of prior rulings by the Court of Appeals for the Ninth Circuit, has held that 18 U. S. C. 371, punishing "two or more persons" who conspire to commit an offense against the United States, does not apply to two persons who are husband and wife. This construction of the statute is based on the common law concept of the unity of husband and wife. It is, we submit, an improper construction of the conspiracy statute based upon an outmoded concept.[2] It has been explicitly rejected by the Court of Appeals for the District of Columbia Circuit in *Johnson* v. *United States,* 157 F. 2d 209, and by the Court of Appeals for the Fifth Circuit in *Thompson* v. *United States,* 227 F. 2d 671, and *Wright* v. *United States,* 243 F. 2d 569. In the *Johnson* case, the court said (157 F. 2d at 209):

> * * * No reason remains why the law should not recognize the obvious fact that the relation of husband and wife does not prevent two persons from conspiring to commit an offense. The interest of society in repressing crime requires that the fact be recognized, and our common law system does not require that its recognition await express legislative action.

The question is obviously an important one in the enforcement of criminal law. Since many federal

[2] The rule of evidence which bars a husband or wife from testifying against the spouse is founded on present-day considerations wholly independent of the concept of marital unity, as this Court's opinion in *Hawkins* v. *United States*, No. 20, decided November 24, 1958, demonstrates.

statutes do not proscribe an attempt to commit the particular crime involved, a husband and wife who make elaborate arrangements to violate the law may escape punishment completely if they are apprehended before a substantive violation has occurred. The conflict among the courts of appeals on this basic question of the law of conspiracy should be resolved by this Court.

CONCLUSION

It is respectfully submitted that the Court should note probable jurisdiction of this appeal.

J. LEE RANKIN,
Solicitor General.
MALCOLM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

DECEMBER 1958.

APPENDIX

THOMAS WHELAN
Attorney at Law
411 Orpheum Theatre Bldg.
San Diego 1, California
BElmont 4–3156
and
J. ROBERT O'CONNOR
Attorney at Law
222 Orpheum Theatre Bldg.
San Diego 1, California
BElmont 4–7251

In the United States District Court in and for The Southern District of California, Southern Division

July, 1958, Grand Jury—Southern Division
No. 27809–CR–SD

UNITED STATES OF AMERICA, PLAINTIFF

v.

LUCILLE ALDINE DEGE AND ERNEST DEGE, DEFENDANTS

Order dismissing indictment

In the above-entitled action the motion of Lucille Aldine Dege and the motion of Ernest Dege, defendants therein, that the Indictment be dismissed on the following grounds and for the following reasons:

That said Indictment does not state facts sufficient to constitute a cause of action against these defendants or either of them;

That said Indictment does not state a public offense against the United States;

came on regularly to be heard on Monday, September 8th, 1958, at 10:00 o'clock a. m., in the above-entitled Court in Courtroom Two, located at the Federal Building at 325 West "F" Street, San Diego, California, the Honorable James Carter, a Judge of the above-entitled Court presiding, the United States of America, Plaintiff, being represented by Peter J. Hughes, Assistant United States Attorney, and the defendants Lucille Aldine Dege and Ernest Dege, being represented by their attorneys of record with Thomas Whelan appearing, and said Motions of said defendants having been presented, and the same being submitted to the Court for decision and the Court being fully advised in the premises:

It is hereby ordered on the authority of *Dawson* v. *United States,* 10 Fed. 2d, 106, and *Gros* v. *United States,* 138 Fed. 2d, 261, that the motion of each defendant is granted, and the Indictment against the defendants is dismissed as to each defendant.

Done in open Court this 8th day of September, 1958.

JAMES M. CARTER,
Judge of the United States District Court.

FILE COPY

Supreme Court, U.S.
FILED
AUG 25 1959
JAMES R. BROWNING, Clerk

No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

LUCILLE ALDINE DEGE AND ERNEST DEGE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys,
Department of Justice, Washington 25, D.C.

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1 Fitz-Herbert, *Natura Brevium* (9th ed. 1794) 116L	11
10 Halsbury, *Laws of England* (3d ed. 1955)	14, 18
1 Hawkins, *Pleas of the Crown* (6th ed. 1787)	11, 17
2 Hawkins, *Pleas of the Crown* (6th ed. 1787)	17
3 Holdsworth, *A History of English Law* (3d ed. 1923)	19, 20
4 Holdsworth, *A History of English Law* (3d ed. 1923)	20
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Note, 27 Col. L. Rev. 219 (1927)	12, 14
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Perkins, *The Doctrine of Coercion*, 19 Iowa L. Rev. 507 (1934)	18
Pollock and Maitland, 2 *History of English Law* (1895 ed.)	20
2 Russell, *Crime* (11th ed. 1958)	14
Sayre, *Mens Rea*, 45 Harv. L. Rev. 974 (1932)	18
2 Stephen, *Commentaries on The Laws of England* (21st ed. 1950)	14, 18
1 Wharton, *Criminal Law and Procedure* (Anderson ed. 1957)	14
2 Wigmore, *Evidence* (3d ed. 1940)	21
9 Wigmore, *Evidence* (3d ed. 1940)	23
Williams, *Criminal Law* (1953 ed.)	29, 35
Williams, *The Legal Unity of Husband and Wife*, 10 Mod. L. Rev. 16 (1947)	11, 12, 13, 35
Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (1921)	12
Wright, *The Law of Criminal Conspiracies and Agreements* (1887)	14

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 14

UNITED STATES OF AMERICA, APPELLANT

v.

LUCILLE ALDINE DEGE AND ERNEST DEGE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court wrote no opinion. The order dismissing the indictment is set forth at R. 6–7.

JURISDICTION

On September 8, 1958, the district court dismissed the indictment on the ground that it did not state an offense under 18 U.S.C. 371 (R. 6–7). Notice of appeal to this Court was filed in the district court on October 7, 1958 (R. 7–8). Probable jurisdiction was noted on January 26, 1959, 358 U.S. 944 (R. 8). The jurisdiction of this Court to review, on direct appeal, a judgment dismissing an indictment, based on a construction of the statute on which the indictment is founded, is conferred by 18 U.S.C. 3731.

STATUTE INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

QUESTION PRESENTED

Whether 18 U.S.C. 371, punishing conspiracy of two or more persons to commit an offense against the United States, covers a conspiracy between husband and wife.

STATEMENT

The indictment charged that appellees, who are husband and wife, conspired with each other to smuggle and illegally import into the United States psittacine birds, and to conceal and transport the birds after illegal importation (R. 2–4). Appellees moved to dismiss on the ground that the indictment failed to charge an offense (R. 5). The district court dismissed the indictment on the authority of *Dawson* v. *United States*, 10 F. 2d 106, certiorari denied, 271 U.S. 687, and *Gros* v. *United States*, 138 F. 2d 261, two decisions of the Ninth Circuit to the effect that

a husband and wife are incapable of engaging in a criminal conspiracy (R. 6–7).

SUMMARY OF ARGUMENT

1. The question whether husband and wife have the capacity to conspire is not answered by the federal conspiracy statute, 18 U.S.C. 371. While making it a crime for "two or more persons" to agree to commit a federal crime, the statute left to the development of the common law questions of the capacity of persons to make such agreements. Nor does the supposed antiquity of the common law rule that husband and wife are one, and hence lack the capacity to conspire, require its continued acceptance today. As this Court has frequently recognized, the "peculiar boast and excellence" of the common law is its flexibility and its capacity to adapt to changed conditions. *Hurtado* v. *California,* 110 U.S. 516, 530; *Funk* v. *United States,* 290 U.S. 371, 382–383. If, as we contend, the concept of marital unity on which the rule is based has no validity today, and no new justification for the rule can be found, the rule can and should be rejected by this Court.

2. Although the ancient notion that husband and wife are one was early proclaimed by commentators to make impossible a conspiracy between them, there was in fact little, if any, direct case authority for the rule in the early common law. Nor were the implications of the unity concept ever fully accepted in other areas. Thus, for example, a wife could be joined with her husband in a conspiracy with a third party, be held for inciting her husband to crime, and be charged

for a substantive offense committed without the presence or participation of her husband.

Whatever its validity at an earlier age, however, the changed status of the wife deprives the unity concept of any continued vitality today. The wife enjoys civil and political rights fully equal to those of her husband. Similarly, the major common-law immunity of a wife from criminal liability—the presumption that a wife committing a crime in the presence of her husband acted under his direction—has all but disappeared. Formerly conclusive, the presumption is now universally rebuttable by a slight showing of independence of action, and in many jurisdictions the defense has been abandoned altogether. The common ground of the modern decisions on the question is their recognition of the changed status of women and their refusal to be bound by a precept of a bygone age.

Recognizing the lack of validity of its historical basis, the courts of appeals for the District of Columbia and the Fifth Circuits, as well as the courts of several states, have already rejected the rule that husband and wife cannot conspire. Unless there is a modern-day justification for its retention, this Court should, we submit, follow their lead.

3. The controlling question, therefore, is whether there are any considerations valid today which justify retention of the rule. It is our view that there are not, and that those that have been suggested are simply evidentiary considerations which might be relevant to the conduct of the trial of such cases but

which cannot support an absolute rule of immunity from substantive liability.

The argument resting upon the needs of marital privacy and confidence would unnecessarily give to the marital pair a substantive immunity not enjoyed in any other relationship of confidence or intimacy. Prevailing evidentiary rules barring adverse spousal testimony fully protect the intimacies of marriage. While those rules may sometimes make adequate proof of the conspiracy impossible, that affords no reason for relieving the couple from liability if the Government is able to prove their criminal conspiracy by acceptable evidence from other sources.

The arguments stressing the unique nature of the crime of conspiracy and the unlikelihood of an arms-length agreement between husband and wife likewise would justify at most only the imposition of more rigid standards of proof and not a complete immunity. Congress determined long ago that conspiracy is a societal danger that should be punished. Husband and wife, now discrete persons in practice as well as in theory, have been universally recognized as capable of contracting with one another. When their agreement is one to commit a crime, the additional threat to society resulting from their concert of action is as great as that flowing from any other combination. It may, indeed, be even greater, for the relationship of intimacy which they enjoy provides a unique opportunity for collaboration without fear of suspicion and may give to their joint scheme a cohesiveness lacking in a conspiracy among strangers.

Finally, none of the arguments advanced justify the dichotomy they would perpetuate between a married woman's substantive criminal liability and her immunity from conspiratorial liability. No aspect of the marriage relationship is apparent, for example, that would justify a distinction between a wife's liability for aiding and abetting her husband in the commission of a crime and her liability for conspiring with him to commit it, but she is admittedly liable as a principal for the former. And if the object of the conspiracy succeeds, the wife's conspiratorial participation would normally seem to be enough, by itself, to make her liable for the substantive offense. Since there is no general federal attempt statute—that function being largely performed by the conspiracy statute—immunizing husband and wife from liability for conspiracy as such in effect simply frees them from punishment unless their conspiracy is successful.

In sum, the arguments advanced for retention of the rule seem only to dress it in modern-day garb without in fact providing any better reason for the rule than does the discredited unity concept. Its historical basis having lost its vitality, and no adequate modern-day justification having arisen to take its place, the rule, under settled principles, should cease to exist.

ARGUMENT

I

THE QUESTION WHETHER HUSBAND AND WIFE ARE SEPARATE PERSONS FOR THE PURPOSES OF THE CONSPIRACY STATUTE MAY BE DECIDED BY THIS COURT IN THE LIGHT OF REASON AND EXPERIENCE

18 U.S.C. 371, the general conspiracy statute, makes it a crime for "two or more persons" to conspire to commit an offense against the United States. Appellees were charged with conspiring to smuggle psittacine birds into the United States in violation of federal law. The decision below holds that they are not liable under 18 U.S.C. 371 since, being husband and wife, they are not two persons for the purposes of that statute, but one.

The question is of substantive liability. There is no issue of the right of one spouse to testify against the other, as in *Hawkins* v. *United States*, 358 U.S. 74, or of the right of the government to compel a wife to testify as a person injured by her husband, as in *Wyatt* v. *United States*, No. 119, now pending before this Court. Nor is there a question of the extent of the evidence necessary to show a conspiratorial agreement between husband and wife, such as whether, in the light of the close association stemming from the relationship, more evidence might be needed to show agreement than if other persons were alleged to be conspirators. The effect of the ruling below is that, no matter what the proof may be of actual agreement and active cooperation between husband and wife, no matter what the proof may be that each, individually, engaged in acts in

furtherance of that agreement, the husband and wife are immune from the punishment that is imposed on all other persons who agree to engage in crime.

If the statute were read literally in the light of present-day concepts, there would be little question that husband and wife could be liable as conspirators. The statute forbids an agreement between "two or more persons" to commit a federal crime, and in today's concepts husband and wife are undeniably two "persons" who may so agree. We recognize, however, that that may be too facile an approach. While conspiracy as a federal crime stems from the Act of March 2, 1867, 14 Stat. 471, 484, both the concept of conspiracy as a crime and the concept of the unity of husband and wife have their roots in the common law. While making conspiracy a statutory crime, the statute did not say what persons were capable of conspiring, but left to the courts, as before, the function of defining, by the processes of the developing common law, the capacity of persons to enter such agreements. If the capacity to make the agreement be otherwise recognized by the law, the statute makes the agreement unlawful, but, if the capacity be denied, there can be no agreement and hence no violation of the statute. At bottom, therefore, the question here is not so much one of statutory interpretation, in the strict sense, as it is one of judicially defining the juridical capacity or status of husband and wife for this purpose.

The common law rule that husband and wife, being one, are incapable of conspiracy is admittedly of ancient, if dubious, origin. If lacking in modern-day

justification, however, its antiquity alone cannot save it. "The year books can teach us how a principle or a rule had its beginnings. They cannot teach us that what was the beginning shall also be the end."[1] It is its "flexibility and capacity for growth and adaptation" that is "the peculiar boast and excellence of the common law." *Hurtado* v. *California,* 110 U.S. 516, 530. As this Court observed in overruling no less ancient a rule—the incompetency of one spouse to testify on behalf of the other—"the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions"; the courts are not "forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time"; it is rather the duty of a court, "in the light of fundamentally altered conditions," to decide a question presented to it "in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past". *Funk* v. *United States,* 290 U.S. 371, 382–383.[2]

The rule that husband and wife are incapable of conspiring is, we believe, such a rule. As we shall show, it rests upon a metaphysical notion of the unity

[1] Cardozo, *The Growth of the Law* (1924) 104–105, approving the abolition in New York, in *Oppenheim* v. *Kridel,* 236 N.Y. 156, of the ancient rule that a married woman, because deemed to have no interests or rights of her own, could not maintain an action for criminal conversation.

[2] See also Rule 26, F. R. Crim. P; *Wolfle* v. *United States,* 291 U.S. 7; *Lutwak* v. *United States,* 344 U.S. 604; *Weiler* v. *United States,* 323 U.S. 606; *Hawkins* v. *United States,* 358 U.S. 74; cf. *Girouard* v. *United States,* 328 U.S. 61, 69–70.

of husband and wife which, examined in the light of present-day concepts of the nature of marriage, can no longer sustain it. Nor are there other considerations more relevant to our time and place that afford a new justification for retention of the rule. It is, therefore, but a relic of the past which should now be abandoned.[3] The courts of appeals for the District of Columbia and the Fifth Circuits have already so held,[4] and it is their view, rather than the outmoded one adopted by the Ninth Circuit in decisions which the district court felt bound to follow,[4] that we submit should be adopted by this Court.

II

THE OLD COMMON LAW RULE THAT HUSBAND AND WIFE CANNOT CONSPIRE TOGETHER CAN NO LONGER BE SUPPORTED BY ITS HISTORICAL BASIS

A. THE RULE DERIVED FROM, AND TO THIS DAY, WHERE IN FORCE, IS SUSTAINED UPON, THE ANCIENT NOTION OF CONJUGAL UNITY

1. The precept that husband and wife cannot conspire one with the other owes its origin to the ancient doctrine of marital unity—*i.e.*, that husband and wife are one, that one being the husband. The doctrine had a biblical origin, and from that source passed into the English law as a maxim describing the marital

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[3] *Johnson* v. *United States*, 157 F. 2d 209 (C.A.D.C.); *Thompson* v. *United States*, 227 F. 2d 671 (C.A. 5); *Wright* v. *United States*, 243 F. 2d 569 (C.A. 5), certiorari denied, 355 U.S. 831.

[4] *Dawson* v. *United States*, 10 F. 2d 106, certiorari denied on others issues, 271 U.S. 687; *Gros* v. *United States*, 138 F. 2d 261 (see *supra*, pp. 2–3).

relationship. See Williams, *The Legal Unity of Husband and Wife,* 10 Mod. L. Rev. 16–18 (1947).[5]

The earliest formulation we have found of the doctrine as the basic premise of the rule that husband and wife cannot conspire together appears in the early 16th century writing of Fitz-Herbert, who claimed (1 *Natura Brevium* (9th ed. 1794) 116 L.):

> And a man shall not have a writ of conspiracy for indicting him of felony, against husband and wife, because they are but one person; but against husband and wife and a third person it well lieth.

Hawkins, writing in the 18th century, is, however, generally credited with being the basic architect of the doctrine, giving it the authority of a fixed concept of the common law. Speaking of the Third Ordinance of Conspirators (33 Ed. 1, 1304), he observed (1 *Pleas of the Crown* (6th ed. 1777) 351):

> It plainly appears from the words of the statute, That one person alone cannot be guilty of conspiracy within the purport of it; from whence it follows * * * That no such prosecution is maintainable against a husband and wife only, because they are esteemed but one person in law, and are presumed to have but one will.

[5] Bracton talked of husband and wife "who are as it were one person, being one flesh and one blood". 6 Bracton, *Laws and Customs of England* (Twiss 1883) 392, 393. Later, Lord Coke espoused the doctrine (Coke, *Littleton* 6b). And Blackstone thereafter wrote that "the husband and wife are one person in law: * * * that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband * * *". 1 Blackstone, *Commentaries* (Lewis ed. 1897) 411.

Despite Hawkins' authoritative formulation of the rule, neither he nor Fitz-Herbert could rely on clear judicial decisions. Two decisions of the 14th Century, in the reign of Edward III, cited as authority for the rule, were actually cases in which a husband and wife were joined with others in the conspiracy charge. In neither was any opinion expressed that husband and wife could not conspire.[6] *R.* v. *Cope* (1719), 1 Strange 144, 93 Engl. Repr. 438, although subsequently relied upon in support of the rule, does not mention it. It held that husband and wife, joined by servants, could be convicted of conspiracy, the court noting, indeed, that the intimate relationship of the parties was strong circumstantial evidence of the conspiratorial agreement there charged. So also, in *R.* v. *Locker*, 5 Esp. 106 (1804), where husband and wife and a third party were joined in the conspiracy charge, the court ruled 'only that the wife of the third party was not a compellable witness by the husband and wife.'[7] Similarly, the basic exception to the rule—*i.e.*, that the moment a third party joins the scheme all three can be jointly charged and convicted for conspiracy—was not articulated as an "exception" at

[6] Y.B. (1363/64) 38 Ed. III, f. 3; Y.B. (1345) 19 Ed III. The unsatisfactory nature of these decisions as authority for the rule is pointed out in Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (1921) 64; Williams, *The Legal Unity of Husband and Wife*, 10 Mod. L. Rev. 16, 20, n. 16 (1947); Note, 27 Col. L. Rev. 219 (1927).

[7] Significantly, in a later English decision where the husband and wife and wife's brother were charged with conspiracy, the prosecution indicated to the jury that they might well infer from the facts that anything "the wife did was under the influence and in consequence of coercion by her husband". The

all in the alleged case authority. See *R.* v. *Cope*, 1 Strange 144, 93 Engl. Repr. 438, *supra*; *R.* v. *Whitehouse* (1852) 6 Cox C.C. 38 (conviction of husband, wife and daughter).[8]

While there is some dicta in a few later English cases recognizing the validity of the rule upon the unity theory (*e.g.*, *Director of Public Prosecutions* v. *Blady*, 2 K.B. 89, 92 (1912) (Lush J., dissenting); *R.* v. *Peel*, The Times, March 8, 1922, cited in *Kowbel* v. *The Queen*, 110 Can. Cr. Cas. 47, 52 (1954)), it was not until quite recent times that a definite holding was made in Great Britain in support of it. See *Mawji* v. *R.*, 41 Crim. App. Rep. 69, 1 All Eng. Rep. 385 (1957), where the Privy Council, in a case on appeal from Tanganyika, approved the doctrine.[9] Nevertheless, possibly because of its simplicity, definiteness, and seeming "logic," the doctrine was embraced by

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jury thereupon found her not guilty. *R.* v. *Duncan*, 13 J.P. 220 (1849). While the "oneness" doctrine did not apply in that case since a stranger to the marriage was involved in the scheme, the decision, if anything, indicates a different approach to the problem—one which permits indictment and trial of the marital pair, conditioning their guilt upon the particular facts as developed by the evidence. It is akin to the doctrine of coercion utilized in the trial of substantive crimes which imposes a rebuttable presumption that the married woman committing a substantive crime in her husband's presence acted under his command and direction (see *infra*, pp. 21–23).

[8] Also under the rule it has been said that, where the conspiracy occurred before the marriage, no bar to trial after marriage obtained. See *Robinson's Case* (1746), 1 Leach 37, where the marriage itself was the object of the conspiracy.

[9] An eminent English commentator had observed, in 1947, that the rule had never been applied in an English court. Williams, *The Legal Unity of Husband and Wife*, 10 Mod. L. Rev. 16, 21 (1947).

text writers and repeated under the same rationale both by British and American commentators—albeit in some instances with criticism—to this day.[10]

2. The modern decisions which adhere to the rule give no reason for its continuing validity beyond reiterating the concept of marital unity announced by Fitz-Herbert and solidified by Hawkins. Thus, the recent decision of the Privy Council in *Mawji* v. *R.*, *supra*, relied upon Hawkins' formulation of the unity doctrine and observed simply that there was no dispute in that case that under English criminal law husband and wife could not be guilty of conspiracy together." The same rationale was adopted recently in Canada, *Kowbel* v. *The Queen*, 110 Can. Crim. Cas. 47 (1954) (compare the contrary decision when the case was before the Ontario Court of Appeals, 106 Can. Crim. Cas. 65), and not too many years ago in New Zealand, *R.* v. *McKechie*, [1926] N.Z.L.R. 1, commented on in Note, 27 Col. L. Rev. 219 (1927). In

[10] See, *e.g.*, 4 Blackstone, *Commentaries* (Lewis ed. 1900) 1534 (n. 45); Wright, *The Law of Criminal Conspiracies and Agreements* (1887) 127; 10 Halsbury, *Laws of England* (3d ed. 1955) 291–292, n. (q); 2 Bishop, *Criminal Law* (9th ed. 1923) 130; 3 Burdick, *Law of Crime* (1946) 451; 1 Wharton, *Criminal Law and Procedure* (Anderson ed. 1957) 81; 2 Russell, *Crime* (11th ed. 1958) 1696; Archbold, *Pleading, Evidence and Practice in Criminal Cases* (34th ed. 1959) 21; 2 Stephen, *Commentaries on The Laws of England* (21st ed. 1950) 491–492. As Bishop stated the modern form of the rule (at 130):

"2 Husband and Wife,—being regarded in the law as one person, cannot without other combination commit this offence [citing Hawkins]. But where there is another conspirator, a wife may be joined with her husband in the indictment. In like manner, the husband and his wife may be prosecuted together, for a conspiracy entered into before their marriage."

this country, of the few decided cases dealing with the problem, those that support the rule at all—generally of ancient vintage and stating the rule only as dictum—likewise do so on the "oneness" doctrine.[11]

The rule was accepted on that basis in the Ninth Circuit, *Dawson* v. *United States*, 10 F. 2d 106, certiorari denied, 271 U.S. 687, although the last time the issue was before that court was in 1943. *Gros* v. *United States*, 138 F. 2d 261. As for the state decisions, the most recent affirmance of the rule we have found was by a trial court in New Jersey. *State* v. *Strück*, 44 N.J.S. 274 (County Ct. 1957).[12] In California, where the indictment in this case was brought, the rule was first applied by the state courts in 1889 in *People* v. *Miller*, 82 Cal. 107, 108.[13] It was grudgingly followed by the District Court of Appeals in 1933 with the comment that "the question merits further consideration by [the California Supreme] Court or by the legislature." *People* v. *MacMullen*, 134 Cal. App. 81, 85. No further consideration has

[11] *State* v. *Clark*, 9 Houst. (Del.) 536 (Ct. Gen. Sess., 1891) (dictum); *State* v. *Christianbury*, 44 N.C. 46, 48 (1852) (dictum: "A husband and wife cannot be indicted for [conspiracy] because in law, they are but one person"); *Commonwealth* v. *Allen*, 24 Pa. Co. Rep. 65 (1900) (dictum); *Commonwealth* v. *Kendig*, 18 Pa. Dist. Repts. 659 (1909) (dictum); *State* v. *Mann*, 39 Wash. 144 (1905) (dictum); *Jones* v. *Monson*, 137 Wis. 478 (1909) (dictum). See cases collected in Anno., 46 A.L.R. 2d 1275.

[12] In *State* v. *Carbone*, 10 N.J. 329, 336 (1952), the rule was noted in dictum.

[13] The *Miller* holding apparently stemmed from the dictum in *People* v. *Richards*, 67 Cal. 412, 415 (1885), that: "* * * one person cannot be guilty of conspiracy; and therefore no prosecution [is] maintainable against a husband and wife only."

been had by the highest court of the state, nor does there appear to have been any later direct affirmance of the rule.[14] In the light of recent criticism of the unity theory in a closely related context by a lower California court, *People* v. *Stately*, 91 Cal. App. 2d 943, 950–951 (1949) (rejecting the common law presumption that a wife who commits a misdemeanor in her husband's presence acts under his coercion), it is not clear that the California Supreme Court would affirm the rule.

It is significant, we believe, that even in the cases upholding the rule no real attempt has been made to support it on any basis other than the theory that husband and wife are one and hence incapable of conspiring with each other.[15] It would seem to follow that if husband and wife are not one, that is to say, if they are separate and distinct individuals, then the rule can have no basis. In short, if the concept of "oneness" is rejected, then the rule must fall with it.

B. THE THEORY OF MARITAL "ONENESS" WAS NOT REALLY ACCEPTED EVEN IN THE ENGLISH COMMON LAW

1. The persistence of the "oneness" concept as the basis of the rule is all the more surprising because it had no real vitality even in the English common law.

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[14] In *People* v. *Keller*, 165 Adv. Cal. App. 469, 474 (1958), and *People* v. *Lizzie*, 41 Cal. App. 2d 797 (1940), there was no decision on the point since the marriages were deemed void.

[15] In *Kowbel* v. *The Queen*, 110 Can. Crim. Cas. 47, 54 (1954), while relying essentially upon the oneness rationale, Judge Estey noted that a charge of conspiracy between husband and wife could interfere "with that confidential and intimate relationship that should always obtain between husband and wife and which has so long been recognized and protected under our law." See pp. 32–33, *infra*.

Within the conspiracy rule itself, its logic breaks down. If husband and wife are so one that they cannot conspire with each other, it would seem to follow that they could not be separate parties to a conspiracy with others. Yet the very writers who recognized the rule and gave it its rationale at the same time enunciated the exception that, should a third party join the conspiracy, husband and wife could each be joined as co-conspirators and be separately convicted or acquitted. They were thus treated as separate persons, not one.

2. The "oneness' theory had even less validity in other phases of the common law dealing with the criminal responsibility of a married woman. As Hawkins himself recognized, a married woman who committed a substantive offense without the aid or presence of her husband was deemed responsible for her conduct and was subject to separate indictment and conviction, as if she were a femme sole. 1 *Pleas of the Crown.* (6th ed. 1777) 4–5. Even more significantly, a wife could be charged with inciting her husband to commit a crime and be jointly convicted with him.[16]

Perhaps the most important limitation upon a wife's criminal liability at common law was that, if she committed a crime in the presence of her husband or participated with him in a crime, it was presumed that she was acting under his command and direction and

[16] 2 Hawkins, *id.* (6th ed. 1787), at 451: "* * * if she be any way guilty of procuring her husband to commit it, it seems to make her an accessory before the fact in the same manner as if she had been sole." See *R.* v. *Manning*, 2 C. & K. 886, 903, n. (a) (1849).

was not guilty even of the substantive offense.[17] While the precise origin of the doctrine is not clear,[18] it rested more and more, as time progressed, upon the principle that a married woman was subservient to

[17] A married woman also was immune from liability as an accessory after the fact to her husband's felony, for receiving stolen property from him, or for stealing his property. See Perkins, *The Doctrine of Coercion*, 19 Iowa L. Rev. 507, 509 (1934); 10 Halsbury, *Laws of England* (3rd ed. 1955) 291–292, n. (q), 303. Cf. 2 Stephen, *Commentaries On The Laws of England* (21st ed. 1950) 491–492. While some of those limitations still apply in various states, particularly the bar against liability for concealment of her husband who has committed a felony (*e.g.*, N.J. Stat. Ann. (1953) 2A: 85–2), they may be explained as part of the modern day protection of marital peace and accord rather than as a true application of the unity rationale. Similarly, insofar as there subsist limitations upon inter-spousal tort liability it would seem that the rationale to support continuation of the rule is the desire to promote domestic peace and tranquility. *Thompson* v. *Thompson*, 218 U.S. 611. See generally on the question of civil responsibility, McCurdy, *Personal Injury Torts Between Spouses*, 4 Vill. L. Rev. 303, particularly at 335–338 (1959).

[18] According to some, it may have stemmed originally from the unity concept. Others have placed it principally on the view that the wife was under the control of the husband. It is said also that the main impetus for the rule was the fact that in the early common law an ever-widening circle of males were allowed to escape the death penalty for felonies by pleading benefit of clergy, while women had no such defense until the end of the 17th Century. To avoid the manifest inequity of putting a woman to death for the commission of a felony jointly with her husband while he escaped with a branding of his thumb, the doctrine of coercion evolved. This explanation coincided with the common law view that the doctrine did not apply in treason, murder and perhaps robbery cases or to misdemeanors, since in such instances benefit of clergy was not available to the husband. See Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 1012–1013 (1932); Perkins, *The Doctrine of Coercion*, 19 Iowa L. Rev. 507, 509–514 (1934).

and under the command of her husband. It was under this rationale that the rule took hold in this country.[19]

3. Even in the field of civil and political rights the disqualifications to which a married woman was subject at common law cannot be explained by recourse to the unity theory. Under that theory, for example, it should have followed that there was a complete union of their separate property rights, or at least that the property interests of the married woman vested in her husband upon marriage. That, however, was never so. While a wife could not alienate a freehold estate without her husband's consent, she continued to own it in her own right, subject only to certain tenancy rights of her husband.[20] And with the intervention of equity in the 16th and 17th century she in fact had property to her own use and disposition. Again, while a married woman could not contract on her own behalf, that was because of her proprietary disabilities during coverture and not because she was not a separate and distinct person. Moreover, a wife could commit a civil wrong either alone or in conjunction with her husband, the liability to be enforced in a

[19] The early cases are collected in Anno., 4 A.L.R. 266; see also Anno., 71 A.L.R. 1116.

[20] It is true that all her chattels accrued to her husband upon marriage, but that is explainable by the fact that the common law courts had surrendered jurisdiction over succession of chattels to the ecclesiastical courts and, in defining marital rights to chattels, focused only upon the inter-vivos relationship of the parties, losing sight of the rights the wife might have as a widow. See 3 Holdsworth, *A History of English Law* (3d ed. 1923) 524.

joint suit against the marital pair. See generally, 3 Holdsworth, *A History of English Law* (3d ed. 1923) 520–533; 4 *id.* 476, 477.

It may be seen, therefore, that the implications of the unity theory were never generally accepted even by the English common law. The truth of the matter was perhaps best summed up by Pollock and Maitland (2 *History of English Law* (1895 ed.) 397–434, 403):

> If we look for any one thought which governs the whole of this province of law, we shall hardly find it. In particular we must be on our guard against the common belief that the ruling principle is that which sees a "unity of person" between husband and wife. This is a principle which suggests itself from time to time; it has the warrant of holy writ; it will serve to round a paragraph, and may now and again lead us out of or into a difficulty; but a consistently operative principle it can not be. We do not treat the wife as a thing or as somewhat that is neither thing nor person; we treat her as a person. * * *

C. THE CONCEPT OF "ONENESS" HAS NO VITALITY TODAY

1. As time went on, a woman's political and social status was given more and more recognition. The law gave to her, whether single or married, more and more rights. Virtually the last vestiges of a married woman's civil disabilities have been removed in this country by the Married Women Acts.[21] A married

[21] These have been adopted in virtually all of the states. See, *e.g.*, 14 McKinney's Consolidated Laws of New York, Domestic Relations Law (1957) §§ 50–61; Smith-Hurd, Ill. Ann. Stat. (1959) Ch. 68, §§ 1–10; Ohio Rev. Code Ann. 1954) §§ 3103.05–3103.08; Mich. Stat. Ann. (1957 Rev.) Ch. 254, §§ 26.161–

woman may separately acquire and convey property, enter into contracts with third parties as well as her husband, sue and be sued, engage in any occupation, make a will. She may vote and run for office. In short, she enjoys the civil rights and privileges on a par with her husband. Her status, just as that of a single woman, has been made equivalent to that of the male. By 1913, Mr. Justice Holmes could term the unity concept "the now vanishing fiction".[22] Professor Wigmore more severely characterized it as a "piece of semi-medieval metaphysics".[23] However termed, it can no longer support a modern rule of law.

2. In the field of criminal law, the changed status of women has likewise been given recognition. The single most important common law rule limiting a wife's criminal liability—the presumption that a married woman committing a crime in the presence of her husband acted under his coercion (see *supra*, pp. 17–19)—has, for example, undergone marked modification.

Although the presumption was apparently irrebuttable at the early common law, *Trust Co.* v. *Sedgwick*, 97 U.S. 304, 308, it has long since become rebuttable by a slight showing of voluntary independent action on the part of the married woman. Today it appears

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26.181; Ky. Rev. Stat. (1959) §§ 404.010–404.060; 34 Ala. Code (1940) §§ 65–78; Ark. Stat. Ann. (1947) §§ 55–401 — 55–408; 24 Vernon's Mo. Ann. Stat. (1956) §§ 451.250, 451.290. See McCurdy, *Personal Injury Torts Between Spouses*, 4 Vill. L. Rev. 303, 310–312 (1959).

[22] *Williamson* v. *Osenton*, 232 U.S. 619, 625, holding that a wife may have a different domicile than her husband for purposes of a civil suit for damages against his paramour.

[23] 2 Wigmore, *Evidence* (3d ed. 1940) 731.

on its way to complete rejection. In this country, four states have, by statute, abolished the defense of marital coercion altogether.[24] England and 15 states have, by statute, modified it by abolishing the presumption, so that in those jurisdictions the wife has the burden of making out the defense affirmatively.[25] By judicial decision, 5 or perhaps 6 states have ruled that the generally improved status of women, and specific Acts giving married women equal property and political rights, have, by implication, abolished the presumption.[26] While some 18 states still retain the presumption, most recognize that it is a weak one, and all recognize that it is rebuttable.[27]

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[24] 39 McKinney's Consolidated Laws of New York, Penal Law (1944) § 1092; Minn. Stat. Ann. (1947 ed.) § 610.06; Wis. Stat. Ann. (1958) § 939.46; Rev. Code of Wash. (1951) § 9.01.113.

[25] Criminal Justice Act of 1925, 15 and 16 Geo. 5, c. 86, s. 47; 5 Ariz. Rev. Stat. (1956) § 13–134; Ark. Stat. Ann. (1947) § 41–114; Cal. Penal Code Ann. (1955) § 26; Colo. Rev. St. (1953) § 40–1–8; Ga. Code Ann. (1953) § 26–401; Idaho Code Ann. (1948) § 18–201; Smith-Hurd, Ill. Ann. Stat. (1935) Ch. 38, § 596; Ann. Code of Md. (1957) Art. 35, § 7; Mich. Stat. Ann. (1954) § 28.1071; 8 Rev. Codes of Mont. Ann. (1947) § 94–201; 2 Nev. Rev. Stat. (1955) § 194.010; N.J. Stat. Ann. (1953) 2A: 85–3; 21 Okla. Stat. Ann. (1951) §§ 157–158; Vernon's Tex. Penal Code Ann. (1952) Art. 32; 8 Utah Code Ann. (1953) § 76–1–41.

[26] *King* v. *City of Owensboro*, 187 Ky. 21, 23–25 (1920); *State* v. *Renslow*, 211 Ia. 642 (1930); *Morton* v. *State*, 141 Tenn. 357 (1918); *Evans* v. *State*, 188 Tenn. 637, 638 (1949); *State* v. *Hendricks*, 32 Kan. 559, 564–565 (1884); *Smith* v. *Meyers*, 54 Neb. 1, 6–7 (1898). A recent decision of a lower court in Ohio would appear to put that state into this grouping. *State* v. *Hershberger*, 77 O. L. Abs. 487, 495 (1958); but cf. *Tabler* v. *State*, 34 O. S. 127, 134 (1877).

[27] By judicial decision: *Braxton* v. *State*, 17 Ala. App. 167 (1919); *Mosely* v. *State*, 19 Ala. App. 335, 337 (1923); *State* v. *Clark*, 9 Houst. (Del.) 536, 539–540 (Ct. Gen. Sess., 1891); *Conner* v. *State*, 95 Fla. 765 (1928); *Vukodonovich* v. *State*, 197 Ind.

The federal courts at most also retain the weak presumption and the direction is towards its complete abolition. See, *e.g.*, *Kivette* v. *United States*, 230 F. 2d 749, 755 (C.A. 5); *United States* v. *Anthony*, 145 F. Supp. 323, 340 (M.D. Pa.) (cases collected); see also 9 Wigmore, *Evidence* (3d ed. 1940) 425, n. 7.[28]

The common feature of the decisions abolishing the presumption is their recognition that the question is not to be foreclosed by the out-moded concepts of a former age and their acute awareness of the changed status of a married woman. Thus, the Iowa Supreme Court said in *State* v. *Renslow*, 211 Ia. 642, 648–649 (1930):

> A married women of today, in Iowa, has, with rare exceptions, every right, duty, and privilege that her husband has, or that she would have if unmarried. With this emancipation of women from the disabilities of cover-

169, 171–172 (1925); *State* v. *Hollis*, 163 La. 952 (1927); *State* v. *Cleaves*, 59 Me. 298 (1871); *Commonwealth* v. *Helfman*, 258 Mass. 410, 416 (1927); *State* v. *Patton*, 347 Mo. 303, 308 (1941); *State* v. *Asper*, 35 N.M. 203 (1930); *State* v. *Cauley*, 244 N.C. 701 (1956); *Commonwealth* v. *Jones*, 1 D. and C. 2d 269 (Pa. 1954); *State* v. *Boyle*, 13 R.I. 537 (1882); *State* v. *Minor*, 171 S.C. 120 (1933); *Brown* v. *Commonwealth*, 135 Va. 480 (1923); *Martin* v. *Commonwealth*, 143 Va. 479 (1925); *State* v. *Buchanan*, 111 W. Va. 142 (1931); cf. *State* v. *Haines*, 35 N.H. 207 (1857). By statute: Ore. Rev. St. (1958 Supp.) § 44.360 (31); 1 S. Dak. Code (1939) § 13.0503. As far as we can ascertain, Connecticut, Mississippi, North Dakota, Vermont and Wyoming have not passed upon the problem.

[28] Even in *Dawson* v. *United States*, 10 F. 2d 106 (C.A. 9), certiorari denied, 271 U.S. 687, the leading case in support of the unity rule in the federal courts, the court of appeals recognized that the presumption did not apply to crimes more likely to be committed by women than by men.

> ture, the reason for the rule which has heretofore existed at common law, and has been partially recognized in some of our former cases, has vanished, and with it the rule should go.

And in Nebraska, *Smith* v. *Meyers*, 54 Neb. 1, 7 (1898):

> A wife is no longer a marionette, moved at will by the husband, either in fact or in law; and with the legal recognition of a separate and responsible existence, she must assume some of the burdens of life * * *.

And in California, *People* v. *Stately*, 91 Cal. App. 2d 943, 951 (1949):

> We conclude, then, that the reign of the thousand year old presumption has come to an end. In our society, where almost no bride promises to obey her husband, and where it is not accepted as the usual that a wife does what her husband wishes by way of yielding obedience to a dominant will, the basis for the presumption has disappeared. A presumption that has lost its reason must be confined to a museum; it has no place in the administration of justice.

See also *Brown* v. *Commonwealth*, 135 Va. 480 (1923); *State* v. *Hendricks*, 32 Kan. 559 (1884); *King* v. *City of Owensboro*, 187 Ky. 21 (1920).[29]

[29] Even where the presumption has been retained, the courts have looked to present-day realities for its justification. So in a recent Pennsylvania case, its retention was bottomed not upon archaic principles of rigid subservience of wife to husband, nor upon concepts of unity, but upon the court's belief that it was still a valid, if weak, inference that a wife generally follows

3. Just as the changed status of married women has been universally recognized as requiring rejection of the rule relieving a wife of responsibility for crimes committed in the presence of her husband—either in its entirety or in favor of an easily rebuttable presumption—so also it requires rejection of the rule that husband and wife are incapable of conspiracy. The courts of two federal circuits [30] and of at least three states [31] have expressly so ruled, in each case finding in the flexibility of the common law ample scope to adjust its rules to the evolution of the institution of marriage. As early as 1920, the Supreme Court of Colorado could say (*Dalton* v. *People*, 68 Colo. 44, 47):

> The proposition that man and wife are so literally one person that they cannot agree with each other to commit a crime is as discordant with the present policy and tendency of our laws

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her husband's bidding. See *Commonwealth* v. *Jones*, 1 D. & C. 2d 269, 275 (1954):

> The rule of a rebuttable presumption is flexible enough to accommodate itself to a woman's rising independence and to a realistic inquiry whether or not coercion actually exists in any particular case and in a more enlightened age. The quantum of evidence required to rebut the presumption may vary with the spirit of the times but the rule can remain the same indefinitely.

[30] *Johnson* v. *United States*, 157 F. 2d 209 (C.A.D.C.); *Thompson* v. *United States*, 227 F. 2d 671 (C.A. 5); *Wright* v. *United States*, 243 F. 2d 569 (C.A. 5), certiorari denied, 355 U.S. 831; *Kivette* v. *United States*, 230 F. 2d 749 (C.A. 5); see also *Ex parte Estep*, 129 F. Supp. 557 (N.D. Tex.), affirmed, 228 F. 2d 320 (C.A. 5), certiorari denied, 350 U.S. 996.

[31] *Dalton* v. *People*, 68 Colo. 44 (1920); *People* v. *Martin*, 4 Ill. 2d 105 (1954); *Marks* v. *State*, 144 Tex. Cr. Rep. 509 (1942); cf. *Smith* v. *State*, 48 Tex. Cr. Rep. 233, 240 (1905).

as it was harmonious with the older laws of England.[32]

The Court of Appeals for the District of Columbia Circuit observed (*Johnson* v. *United States*, 157 F. 2d 209):

> The old rule was based on the common-law fiction that husband and wife were one person. Acts of Congress have established the separation of husband and wife as to property, contracts, and torts in the District of Columbia. * * * No reason remains why the law should not recognize the obvious fact that the relation of husband and wife does not prevent two persons from conspiring to commit an offense. The interest of society in repressing crime requires that the fact be recognized, and our common-law system does not require that its recognition await express legislative action.

A similar recognition that the modern-day parity of the sexes makes obsolete the rule against conspiracy between husband and wife appears in *Ex Parte Estep*, 129 F. Supp. 557, 558 (N.D. Tex.), affirmed 228 F. 2d 320 (C.A. 5), certiorari denied, 350 U.S. 996:

> The wife is no longer hidden in the personality of the husband in America. She has her

[32] The court observed that the reasons for the rule were the unity theory and the control of husband over wife, propositions long abandoned in that state. While the second proposition may have played its part in fashioning the rule, it could not have been of great significance. Even in the field of substantive criminal responsibility, where that principle was primarily applied, it soon became only an evidentiary inference. If that principle was also of significance in the conspiracy field, the rule that husband and wife cannot conspire should have developed early into an evidentiary presumption, rather than having been retained as an absolute rule of immunity.

> separate property; she has a part in the community property; she has the right to vote; in many states she is compelled to serve as a juror; she is a legislator in state and nation; she is a practitioner of law; doctor, judge, preacher, merchant, and in many instances, in the Armed Forces. There is every evidence of complete emancipation for the wife in America. The judge would be bold indeed who would hold, in the face of such evident and fair emancipation, that there can be no unlawful agreeing among themselves.

In their conclusion that the rule that husband and wife are incapable of conspiracy can no longer be supported by the concept of unity on which it was historically based, these cases are, we believe, unanswerable. Unless, therefore, there is some modern-day justification for the rule apart from its antiquity, it should be recognized as obsolete and be abandoned. It is to that question of modern day justification that we now turn.

III

NO MODERN POLICY CONSIDERATIONS SUPPORT THE RULE

We recognize that a rule may have a valid current foundation even though old and invalid formulas are offered in support of it. Thus, in *Hawkins* v. *United States*, 358 U.S. 74, 77, this Court found that the privilege of one spouse to exclude the testimony of the other had a valid present-day rationale even though it had formerly been partly sustained on the outmoded unity theory. So also in *Weiler* v. *United States*, 323 U.S. 606, 608–609, the Court, in refusing to overturn the "two-witness rule" in perjury cases,

found a modern justification for it: "The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted."

The final question here, therefore, is whether, despite the present invalidity of the unity concept which is still given as the reason for the rule, there are any cogent factors which support the rule's continuing recognition at the present time. We find none that seem to us to justify retention of the rule.

The arguments for the present-day validity of the rule run as follows: Since the crime of conspiracy is directed primarily at agreement rather than acts, its scope should be carefully circumscribed and it should be applied only where there can be no doubt that at least two wills merge voluntarily. In view of the intimacy and confidence of the marital relationship, there is unlikely to be any arms-length agreement of this nature between husband and wife; regardless of whether the wife approves of her husband's criminal scheme, she will generally agree to it to avoid marital conflict and will follow her husband's lead without that independence of will essential to a true conspiracy. Moreover, it is said, the relationship of the spouses should remain private. The natural repugnance to bringing to light intimate details of a marriage can be out-balanced only by very important social interests, and there is no such prevailing inter-

est where a conspiracy charge is involved.[33] In our view these reasons relate, at best, to the quantum of proof which should be required in a conspiracy charge against husband and wife and do not justify a rule that never, under any circumstances, may a husband and wife be guilty of conspiracy.

1. Taking the reasons advanced in inverse order, the argument of marital privacy seems to us totally invalid. The privacy of marriage is no more a reason for giving immunity to a plot to commit crime than is any other form of privacy. It has never been suggested that the attorney-client privilege gives attorney and client immunity from liability for an active agreement to commit crime. This argument obviously stems from the evidentiary rules barring adverse spousal testimony or the revealing of confidential communications between husband and wife, but it is one thing to say that one spouse may not testify against the other and quite another to say that husband and wife are free to plot crime together.

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[33] See Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 950 (1959), and Williams, *Criminal Law* (1953) 523, where certain of these arguments are discussed and then rejected. The primary argument noted in the Harvard Law Review is stated as follows (at 950):

> * * * It is arguable that there is not sufficient increased risk of harm to society resulting from a husband-wife combination to justify a conspiracy conviction. Even when a husband acts alone, it is likely that his wife will know of his activities and will lend at least tacit support. Thus it may be argued that the margin of increased danger to society when the wife proceeds from tacit support to active participation with her husband is sufficiently small not to merit special punishment as conspiracy * * *.

There is no issue in this case as to the testimonial compulsion of one spouse against the other—obviously where both are named as defendants neither one can be compelled to testify at all. There is no question of fostering marital discord through the judicial process. The single issue is whether the government should be permitted to prove, if it can, under all established evidentiary safeguards, that husband and wife were acting in active concert with each other to commit a crime. The evidentiary rules aimed at safeguarding the marital union from discord, and marital confidences from disclosure, afford ample protection to the marital relationship and there is neither need nor reason to expand them into a substantive bar against criminal liability.

2. As to the arguments stemming from the nature of the crime of conspiracy, we suggest that none of them supports a ruling that husband and wife are never punishable for illegal conspiracy. The judgment that agreement of two or more persons to commit a crime, followed by overt acts in furtherance of the agreement, is a danger to society which should be punished is one which was made long ago and which, as noted, has been the judgment of Congress ever since 1867. The conspiracy statute, moreover, plays a particularly important part in federal criminal law since there is no general statute making attempt a crime, and many acts which would amount to attempts in other jurisdictions are punishable under federal law, if the crime is prevented from reaching fruition, only as conspiracies. Thus in federal law it is especially important that the conspiracy statute apply to

all persons who conspire to commit a crime whether or not they happen to be husband and wife. Husband and wife are today separate and discrete individuals in reality as well as in theory, and their unlawful concert should be just as much an offense as any other unlawful combination.

The independence of the wife's will from that of her husband has been universally accepted by legislation recognizing their capacity to make contracts with one another (see note 21, *supra*). The analogy between contractual and conspiratorial capacity is plain. As suggested by Judge Laidlaw in *R.* v. *Kowbel*, 106 Can. Crim. Cas. 65, 67 (Ont. Ct. of App.) (1953):

> [A married woman] was incapable of making an agreement with her husband and because the very essence of the crime of conspiracy is an agreement between alleged conspirators it was not possible for the spouses to commit that offence. If that disability on her part had not existed and the wife had been free to enter into an agreement with her husband, the law would not have regarded them as one person on a charge of conspiracy, but as separate persons each responsible for his or her wrongful act. It follows, in my opinion, that when the incapacity of a married woman to contract with her husband was removed by law and she was given her freedom to exercise her own will and enter into an agreement whether for a lawful or an unlawful purpose, she thereupon became subject to the criminal law respecting conspiracy and became liable for committing that offence.

While a majority of the Canadian Supreme Court refused to accept this view (110 Can. Crim. Cas. 47, *supra*), we think, nonetheless, that it persuasively refutes the claim that husband and wife cannot, as a matter of substantive law, enter into an unlawful agreement. It is unreasonable to say that a married woman may enter into a civil contract with her husband, and yet may not enter into a criminal agreement with him. While there may be a question in any particular case as to whether the illegal scheme was the product of the joint wills of the spouses, that is an issue to be resolved by the evidence in each case, not by a rigid unyielding rule of law.

Finally, the husband-wife combination directed toward unlawful ends presents just as much, and perhaps more, danger to society than any other unlawful combination.[24] The expected intimacy of husband and wife permits them to collaborate freely without fear of the public suspicion that might be aroused by extended personal contact between strangers. At the same time the mutual confidence arising from the marital bonds gives to their conspiracy a strength and cohesiveness difficult to attain by unrelated persons. In short, the marital relationship offers a unique opportunity for effective concert of action which, when turned to unlawful purposes, may have a significantly greater chance of success than other conspiracies.

3. The argument that, in view of the relationship, there cannot be proof of a conspiracy between husband and wife confuses issues of evidence with the

[24] See Note, *Developments In The Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 950 (1959).

question of criminal liability. To say that husband and wife are not within the reach of the conspiracy statute is no different from urging that other groups of individuals may be outside its ambit because of close ties of intimacy. The fact that the conspiracy is between husband and wife, rather than the spousal pair and their child, or one parent and child, or a group of children, siblings, lovers, or business associates should not make a difference on the basic question of liability.[35]

Proof may in some cases be difficult. In some circumstances, the evidence will not show a true agreement between the spouses. It may turn out that the weaker spouse, whether husband or wife, was controlled by the stronger. Perhaps, to protect against unwarranted convictions in those situations, a rebuttable presumption against independence of action should be indulged in. Obviously, also, no inference of conspiracy could be drawn from a mere showing of constant association between husband and wife, as it might be from proof of constant clandestine meetings among strangers, and precautionary instructions to that effect might be appropriate. However, the possible need of more protective evidentiary safeguards in the *trial* of a husband and wife for conspiracy should not affect decision of the sole question posited here, *i.e.*, whether they can be *charged* with that offense.

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[35] So, for example, in *People* v. *Little*, 41 Cal. App. 2d 797 (1940), although a man and woman believed in good faith that they were married, but in fact were not, a conspiracy conviction against them was upheld.

4. None of the reasons advanced in support of the rule, moreover, justify the dichotomy that it creates between a married woman's substantive criminal liability and her immunity from conspiratorial liability. At the early common law, it might have been argued that the unity concept was essentially an embodiment of the generally accepted doctrine of complete subservience of wife to husband. Just as there was a complete bar to a conspiracy conviction of man and wife, there was a complete bar to the wife's conviction for a substantive offense committed in her husband's presence. But, as we have pointed out, that explanation soon fell apart at the common law, and it has even less vitality today. Even in those states which retain the presumption of coercion, it is no more than a weak inference, easily rebuttable (see *supra*, pp. 22–23). Retention of the conspiracy rule would thus result in the incongruous situation that, while a married woman may be guilty of aiding or abetting her husband in the commission of crime (cf. *Nye & Nissen* v. *United States*, 336 U.S. 613, 618–620; 18 U.S.C. 2), she cannot conspire with him. Similarly, despite the conspiracy bar, a married woman can be charged with inciting her husband in the commission of a crime. If she cannot have an equal intent for the purposes of conspiracy, how can she be deemed to have a more powerful will to support a substantive charge of incitement?

A further anomaly is suggested by *Pinkerton* v. *United States*, 328 U.S. 640. The Court there held that, where the commission of the substantive offense of tax evasion was the natural and foreseeable con-

sequence of the conspiratorial agreement, both co-conspirators could be held liable for the substantive offense even though one of them was incarcerated when it actually occurred. Supposing a similar fact pattern, except that the two are husband and wife, who cannot be convicted of conspiracy, and the husband alone commits the substantive crime, could it be said that, despite *Pinkerton*, both could not be convicted for the substantive offense? And if *Pinkerton* were followed, would it not lead to the anomalous result that, while a conspiratorial agreement between husband and wife can be considered in fixing substantive liability, no liability could attach for a crime which was prevented from reaching fulfillment?[36]

In summary, the suggested modern justifications for the rule, if they are anything more than an embellishment upon the old unity theory, are considerations which go to questions of proof rather than to the issue of substantive criminal liability. Such validity as they may have relates to the trial of the case, not to the charge as such. As we have developed, no reason, whether it be sought in the ancient common law or in modern-day experience, supports an immutable rule negating such liability. Accordingly, under settled principles (*supra*, pp. 8–9), the rule should cease to exist. Cf. *Funk* v. *United States*, 290 U.S. 371, 385.

[36] A similar anomaly in the English law is discussed in Williams, *The Legal Unity of Husband and Wife*, 10 Mod. L. Rev. 16, 22 (1947); see also Williams, *Criminal Law* (1953), 524–525.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court dismissing the indictment should be reversed and the case remanded for further proceedings under the indictment.

J. LEE RANKIN,
Solicitor General.
MALCOLM R. WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

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No. 14

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In The Supreme Court of The United States

October Term, 1959

UNITED STATES OF AMERICA,

Appellant,

vs.

LUCILLE ALDINE DEGE and
ERNEST DEGE,

Appellees

BRIEF OF APPELLEES

THOMAS WHELAN
411 Orpheum Building
San Diego 1, California

Attorney for Appellees

J. ROBERT O'CONNOR,
4th Floor
U. S. Grant Building
San Diego 1, California

Of Counsel

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CONSTITUTION

Constitution of the United States, Subsection 3, Section 9, Article 1 5

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1959

No. 14

UNITED STATES OF AMERICA,

Appellant,

v.

LUCILLE ALDINE DEGE and
ERNEST DEGE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLEES

STATEMENT OF THE RECORD

The brief of appellant, United States of America, correctly states the jurisdiction (P. 1); the question involved (P. 2); and the proceedings in the Court below (P. 3-4) - except that:

The Indictment (R. 2-3-4-) sets forth ten separate overt acts alleged to be pursuant to and to effect the objects of the alleged conspiracy (R. 3-4), numbers 2, 3, 5, 7 and 10 of which, if true and provable, conclusively show that the Indictment need not have been drawn and returned against appellees alone, but others, either as defendant conspirators or unindicted co-conspirators, could have been named as participants in the alleged conspiracy, thus avoiding the question appellant raises on this appeal.

ARGUMENT

Appellees concede that appellant has presented a scholarly and well written brief. Appellant's brief shows the expenditure of much time, considerable research as well as effort and ingenuity in its preparation. Appellees cannot agree with the conclusions reached by appellant, and respectfully suggest that by this appeal, appellant seeks:

I

JUDICIAL LEGISLATION

Appellees respectfully suggest that appellant desires judicial legislation by this Honorable Court when

it should be apparent to everyone in the Department of Justice that the remedy the Government seeks should be sought from the Congress.

On pages 30-31 of appellant's brief it is stated:

> "The conspiracy statute, moreover, plays a particularly important part in federal criminal law since there is no general statute making attempt a crime, and many acts which would amount to attempts in other jurisdictions are punishable under federal law, if the crime is prevented from reaching fruition, only as conspiracies. Thus in federal law it is especially important that the conspiracy statute apply to all persons who conspire to commit a crime whether or not they happen to be husband and wife."

This is the theme of appellant's brief, see page 6 where it is stated:

> "Since there is no general federal attempt statute - that function being largely performed by the conspiracy statute - immunizing husband and wife from liability for conspiracy as such in effect simply frees them from punishment unless their conspiracy is successful."

Is there anything wrong with Congress enacting legislation which would make an attempt to commit a crime a public offense, defining an attempt and declaring a penalty for an attempt?

Is such legislation a problem for the Congress?

Is such legislation a problem for the Supreme Court of the United States?

In holding contrary to the appellant's (Government's) contention here, the Ninth Circuit in Dawson v. U.S., 10 Fed. 2d 106 at 108, (Certiorari denied 271 U.S. 687), says:

> "A rule so well established and so generally recognized by the modern authorities should not be judicially repealed."

If the legislature has not specifically declared a crime the Court may not enlarge the reach of enacted crimes and thus seize an unwarranted jurisdiction.

See U.S. v. Hudson and Goodwin, 7 Cranch 32 3 L. Ed. 259; (cited in) Morissette v. U.S., 72 S.C. 240, 249-250 - 342 U.S. 246.

II

EX POST FACTO LAW

In California, at least since People v. Miller (1889) 82 Cal. 107, husband and wife alone can not be guilty of a conspiracy in violation of state law. In 1933, in People v. MacMullen, 134 Cal. App. 81, 85, Justice Burroughs takes a kick at People v. Miller, and suggests among other things: "the question merits further consideration by that (Supreme) Court or by the legislature". The California legislature has not seen fit to declare by statute that husband and wife alone can be guilty of the crime of conspiracy under state law; The California

Supreme Court denied a hearing in People v. McMullen.

In the area of the Ninth Circuit at least since Dawson v. United States, 10 Fed. 2d 106, (Certiorari denied, 271 U.S. 687), and Gros v. United States, 138 Fed. 2d 261, a husband and wife alone are incapable of engaging in a criminal conspiracy in violation of the laws of the United States.

For this Honorable Court to reverse the trial Court, and the cases upon which the trial Court's decision rested, would not only be in effect judicial legislation on the part of this Honorable Court - but would have the effect of saying now that appellees are guilty of a crime for doing in 1957 and 1958 acts which have been considered not unlawful since Dawson in 1926, and the lawfulness of which have never been questioned in the area of the Ninth Circuit since Gros in 1943.

In effect appellant asks this Honorable Court to declare, then affirm an ex post facto law.

For the Congress to enact legislation now making criminal the acts of appellees during 1957-1958 would be in violation of subsection 3, Section 9, Article 1, U.S. Constitution.

Will the Supreme Court at the behest of the appellant Government circumvent that same provision of the Constitution?

FURTHER DISCUSSION

NINTH CIRCUIT SHOULD BE UPHELD

Appellees urge that the rule of the Ninth Circuit should be upheld, not only because the sustaining of that rule will have such a profound and lasting effect upon their personal fortunes, but because it is the correct rule based upon precedent, history, morals, sound reasoning and because the continuation of that rule will of necessity protect and preserve family ties - and the preservation of families and the family relationship is the strongest rock upon which the preservation of our nation - our form of Government - is built.

THE RULE OF THE NINTH CIRCUIT IS:

Husband and wife alone are incapable of engaging in a criminal conspiracy in violation of Federal Law.

Dawson v. U.S., 10 Fed. 2d 106
(Rehearing denied 271 U.S. 687)

Gros v. U.S., 138 Fed. 2d 261

THE CONTRARY RULE

The rule of the Court of Appeals for the District of Columbia Circuit and for the Fifth Circuit is found in:

Johnson v. U.S., 157 Fed. 2d 209
Thompson v. U.S., 227 Fed. 2d 671

Kivette v. U.S., 230 Fed. 2d 749

Wright v. U.S., 243 Fed. 2d 569

all cited in appellant's brief.

The last three decisions are based principally, if not entirely, upon Johnson v. U.S., (supra) where it is said:

> "The old rule was based on the common-law fiction that husband and wife were one person. Acts of Congress have established the separation of husband and wife as to property, contracts and torts in the District of Columbia. * * * No reason remains why the law should not recognize the obvious fact that the relation of husband and wife does not prevent two persons from conspiring to commit an offense. The interest of society in repressing crime requires that the fact be recognized, and our common-law system does not require that its recognition await express legislative action." (Emphasis added)

Apparently the Court of Appeals based its conclusion because of the acts of Congress legislating with reference to affairs within the District of Columbia, only. To use the Court's own language - "No reason remains" to believe otherwise.

The rule of the Ninth Circuit finds support in the California rule expressed by the Supreme Court of California in the Miller case, and by the refusal of that Court to grant a hearing in the MacMullen case.

THE "ONENESS" THEORY

Appellant spends from page 10 forward of its 36 page brief to point out that the "oneness" or unity theory can no longer be supported by its historical basis (P. 10); and that no modern policy considerations support the rule.

Appellant points out that the doctrine had a Biblical origin - Is that bad?- and from that source passed into the English law as a maxim describing the marital relationship (P. 10-11).

On page 16 under a headnot appellant says: "The theory of marital "oneness" was not really accepted even in the English Common Law."

Appellees have commented on the effort, the research, skill and ingenuity of the author of appellant's brief - but it seems to appellees that the author in some instances reasons incorrectly from a true premise to a false conclusion; at other times reasons incorrectly from a false premise to an equally false conclusion.

"ONENESS" THEORY RECOGNIZED BY CONGRESS AND SUPREME COURT

Even if the "oneness" theory was not really accepted in the English common law, it has been accepted by the Congress of the United States.

This is not appellees' construction of the Expatriation Act of 1907 - it is the construction of this Honorable Court:

In Perez v. Brownell, 72 S. C. 568 at 572, this Court in referring to MacKenzie v. Hare, 239 U.S. 299, 36 S.C. 106, 60 L. Ed. 297, said:

> "The Court, through Mr. Justice McKenna, after finding that merging the identity of husband and wife, as Congress had done in this instance, had 'purpose and, it may be, necessity, in international policy' ----."

In MacKenzie v. Hare, 239 U.S. 299 at 311, Mr. Justice McKenna said:

> "The identity of husband and wife is an ancient principle of our jurisprudence."

THERE IS MODERN POLICY CONSIDERATION FOR SUPPORT OF RULE

This Honorable Court has stated in a decision of this Court as recently as 1958, that it should be the policy of the law to encourage the cementing of family relationships and to promote harmonious relationships between husband and wife.

In Hawkins v. U.S., 358 U.S. 74 at 77, this Honorable Court speaking of the rule barring testimony of one spouse against the other, has this to say:

> "The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit

> of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now."

and, at page 79

> "----- there is still a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences. Under these circumstances we are unable to subscribe to the idea that an exclusionary rule based on the persistent instincts of several centuries should now be abandoned."

PUBLIC POLICY INVOLVED

Every philosopher, teacher, educator, historian and lawmaker down through the years, down through the centuries has recognized that the stability of the home, the stability of the family, has been the backbone of established government.

Any attempt on the part of Government to interfere with the stability of the home and family will be of fatal tendency.

With the thought of the threat of Communism memory goes back to the days following World War One. Those who had overthrown the Czarist Government and were in charge of affairs in Russia were called Bolsheviks, and when the question in the minds of most people was: "Must we fear Bolshevism?" an address

was delivered in the auditorium of Creighton University, Omaha, Nebraska, by quite an American, Edward H. Whelan, now deceased, but a lawyer, soldier, author and patriot, who then made the declaration:

> "The greatest foe of, and bulwark against Bolshevism in this country today is the Irishman, the Irishman's wife, the Irishman's family, and the Irishman's Church."

These remarks true then, truer now, illustrate appellees' contentions.

This reference is not made in support of any particular religion - but in support of all religions who profess a belief in a Supreme Being . Appellees (Dege) have no particular religion.

THE RESULTANT CONFUSION

Should this Honorable Court sustain the appellant's contentions,what effect would this decision have when considered with the rule in Hawkins v. U.S., supra?

Imagine a situation where a husband and wife were indicted in one indictment, one count of conspiracy charging both husband and wife, and the husband charged with three separate counts, each one charging a distinct substantive offense. On the trial the husband elected to remain off the witness stand and the wife, with a perfectly valid defense to the charge of conspiracy cannot justify herself without giving evidence against her husband, and the husband objects to the wife's testimony

under the rule in Hawkins v. U.S.

THE APPELLANT'S DREAM

It is just that - appellant at several parts of its brief anticipates trouble if its contention is upheld -

At page 5 of appellant's brief the following appears:

> "The arguments stressing the unique nature of the crime of conspiracy and the unlikelihood of an arms-length agreement between husband and wife likewise would justify at most only the imposition of more rigid standards of proof and not a complete immunity."

again at page 29:

> "In our view these reasons relate, at best, to the quantum of proof which should be required in a conspiracy charge against husband and wife and do not justify a rule that never, under any circumstances, may a husband and wife be guilty of conspiracy."

But appellant's real uncertainty appears on page 33 as follows:

> "Proof may in some cases be difficult. In some circumstances, the evidence will not show a true agreement between the spouses. It may turn out that the weaker spouse, whether

husband or wife, was controlled by the stronger. Perhaps, to protect against unwarranted convictions in those situations, a rebuttable presumption against independence of action should be indulged in. Obviously, also, no inference of conspiracy could be drawn from a mere showing of constant association between husband and wife, as it might be from proof of constant clandestine meetings among strangers, and precautionary instructions to that effect might be appropriate. However, the possible need of more protective evidentiary safeguards in the trial of a husband and wife for conspiracy should not affect decision of the sole question posited here, i.e., whether they can be charged with that offense."

From the quoted portion of appellant's brief it is apparent that the appellant is not quite sure of what appellant expects of this Honorable Court. As Appellees read it, a logical ruling on the part of this Honorable Court would be to affirm the trial Court.

CONCLUSION

Because a reversal of the order of the trial Court would constitute:

1. The adoption of Judicial legislation.

2. What in principle would be ex Post Facto legislation.

3. A change in established Precedent.

4. A disavowal of a principle established by Congress and approved by this Honorable Court.

5. A violation of established Public Policy.

6. Confusion as to Procedures and Rules on admissibility of evidence

it is urged that the order of the trial Court be sustained.

Respectfully submitted,

THOMAS WHELAN

Attorney for Appellees

J. ROBERT O'CONNOR
Of Counsel

October, 1959

FILE COPY

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No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

LUCILLE ALDINE DEGE AND ERNEST DEGE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys,
Department of Justice, Washington 25, D.C.

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REPLY BRIEF FOR THE UNITED STATES

Appellees, in asserting that it would be retrospective judicial legislation to hold that a husband and wife are separate persons under the conspiracy statute, misconceive the thrust of the government's argument. In our view, Congress did not deal with the capacity of husband and wife to conspire either when it adopted the first general conspiracy statute in 1867 (14 Stat. 471, 484) or when it readopted it in the 1948 recodification of the Criminal Code.[1] As had always been

[1] If the conspiracy statute can be said to deal with capacity, then it could well be argued that the present statute reenacted as positive law in 1948, when husband and wife enjoyed a separate legal status, shows a Congressional intent to cover a conspiracy between husband and wife.

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the case, it left to the courts, applying the evolving principles of the common law, the function of determining whether husband and wife could unlawfully combine together.

Relegating to the judiciary questions of capacity is not a novel view, but one founded upon familiar principles. For example, no one would contend that the defense of insanity as it existed in 1867 was meant by Congress to be frozen into the conspiracy statute or, for that matter, that Congress intended to freeze into any other criminal provision the elements of that defense prevailing at any particular time. Surely, Congress intended rather to leave this defense elastic—*i.e.*, to leave it to judicial interpretation and application so that it would at all times mirror the societal view "here and now". Cf. *Fisher* v. *United States*, 328 U.S. 463.

An appropriate analogy may be drawn from a decision of the New York courts in 1954 (*People* v. *Morton*, 284 App. Div. 413, affirmed, 308 N.Y. 96) holding that a husband can commit larceny of his wife's property. Under the same fiction of spousal identity that we challenge in this case, it had been held at the common law that one spouse could not steal from the other.[2] Since the New York larceny statute (Penal Law § 1290) which punishes a felonious taking from "another" had not been materially changed since 1830, appellant in that case argued that the common-law rule was still in force and thus precluded his conviction. Both the Appellate Division, Second Depart-

[2] See generally Anno., 55 A.L.R. 558.

ment, and the Court of Appeals, in precise terms, rejected this contention. In dealing with the claim that the court was engaging in judicial legislation, Judge Nolan of the Appellate Division said (284 App. Div. at 420):

> The statement of this conclusion does not create a new criminal law by judicial fiat. Our statutory definition of larceny (Penal Law, § 1290), of which the rule formed no part, remains unchanged by our determination. Neither does it involve the arrogation of a legislative prerogative. Direct legislative action would be appropriate, but is not required. The power to adapt, or to abrogate obsolete rules, which in their origin were of judicial creation, is one which the courts have always possessed * * * and which they have not only the right, but the duty to exercise when justice demands it * * *.

Approving the decision of the court below, Judge Desmond, speaking for a unanimous Court of Appeals, observed (308 N.Y. at 99–100):

> The larceny statutes, old and new, penalize, in varying verbiage, the wrongful taking of the property of another. Before the Married Women's Acts, the existing larceny laws were inapplicable to a husband's taking of his wife's chattels, but only because such chattels did not belong to 'another' but, under the old fictions, belonged to the husband himself. So, when the wife became 'another', the larceny statutes without necessity of amendment covered her

losses as well as those of any other lawful owner of property. * * * *

So here, we ask the Court, not to legislate, but to perform the basically judicial task of determining, in the light of present-day concepts, whether husband and wife have the capacity to enter into an illegal agreement. If, as we urge, this determination is properly a judicial function, appellees' *ex post facto* argument must fail. For it is one thing to say that Congress may not adopt substantive criminal legislation of retrospective effect, and quite another to urge that this Court may not repudiate an outmoded doctrine of capacity which had lost its vitality long before appellees committed the offense with which they are here charged.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
MALCOLM R. WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

OCTOBER 1959.

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* A majority of the other states which have dealt with the common law rule precluding criminal liability for inter-spousal theft have likewise abolished it in light of the separate legal existence of husband and wife. See, *e.g.*, *Whitson* v. *State*, 65 Ariz. 395 (1947); *Hunt* v. *State*, 72 Ark. 241 (1904); *State* v. *Herndon*, 158 Fla. 115 (1946); *People* v. *Graff*, Cal. App. 706 (1922); *State* v. *Koontz*, 124 Kan. 216 (1927); *Fugate* v. *Commonwealth*, 308 Ky. 815 (1948).

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SUPREME COURT OF THE UNITED STATES

No. 14.—October Term, 1959.

United States, Appellant, v. Lucille Aldine Dege, et al.	On Appeal From the United States District Court for the Southern District of California.

[June 27, 1960.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an indictment charging husband and wife with conspiring to commit an offense against the United States in violation of § 371 of Title 18 of the United States Code, which was enacted by Congress on June 25, 1948, 62 Stat. 683, 701, in connection with § 545 of that Code, *id.*, 716, in that they sought illicitly to bring goods into the United States with intent to defraud it. On authority of controlling decisions of its Circuit, *Dawson* v. *United States*, 10 F. 2d 106, and *Gros* v. *United States*, 138 F. 2d 261, the District Court dismissed the indictment on the ground that it did not state an offense, to wit, a husband and wife are legally incapable of conspiring within the condemnation of § 371. The case came here on direct review of the order dismissing the indictment, 358 U. S. 944, under the Criminal Appeals Act of March 2, 1907, now 18 U. S. C. § 3731. The construction of § 371 by the Court of Appeals for the Ninth Circuit has been explicitly rejected by the Court of Appeals for the District of Columbia Circuit, *Johnson* v. *United States*, 157 F. 2d 209, and by the Court of Appeals for the Fifth Circuit, *Thompson* v. *United States*, 227 F. 2d 671, and *Wright* v. *United States*, 243 F. 2d 569.

The question raised by these conflicting views is clear-cut and uncomplicated. The claim that husband and

wife are outside the scope of an enactment of Congress in 1948, making it an offense for two persons to conspire, must be given short shrift once we heed the admonition of this Court that "we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule," *United States* v. *Union Supply Co.*, 215 U. S. 50, 55, and therefore do not allow ourselves to be obfuscated by medieval views regarding the legal status of woman and the common law's reflection of them. Considering that legitimate business enterprises between husband and wife have long been commonplaces in our time, it would enthrone an unreality into a rule of law to suggest that man and wife are legally incapable of engaging in illicit enterprises and therefore, forsooth, do not engage in them.

None of the considerations of policy touching the law's encouragement or discouragement of domestic felicities on the basis of which this Court determined appropriate rules for testimonial compulsion as between spouses, *Hawkins* v. *United States*, 358 U. S. 74, and *Wyatt* v. *United States*, *ante*, p. ——, are relevant to yielding to the claim that an unqualified interdiction by Congress against a conspiracy between two persons precludes a husband and wife from being two persons. Such an immunity to husband and wife as a pair of conspirators would have to attribute to Congress one of two assumptions: either that responsibility of husband and wife for joint participation in a criminal enterprise would make for marital disharmony or that a wife must be presumed to act under the coercive influence of her husband and, therefore, cannot be a willing participant. The former assumption is unnourished by sense; the latter implies a view of American womanhood offensive to the ethos of our society.

The fact of the matter is that we are asked to write into law a doctrine that parrot-like has been repeated in deci-

sions and texts from what was given its authoritative expression by Hawkins early in the eighteenth century. He wrote:

> "It plainly appears from the Words of the Statute, That one Person alone cannot be guilty of Conspiracy within the Purport of it; from whence it follows, . . . That no such Prosecution is maintainable against a Husband and Wife only, because they are esteemed but as one Person in Law, and are presumed to have but one Will." (Hawkins, Pleas of the Crown, 4th ed. 1762, Bk. I, chap. lxxii, Sect. 8, p. 192.)

The pronouncement of Hawkins apparently rests on a case in a Year Book of 38 Edward III, decided in 1365. The learning invoked for this ancient doctrine has been questioned by modern scholarship. See Williams, The Legal Unity of Husband and Wife, 10 Mod. L. Rev., 16 (1947); and cf. Winfield, The History of Conspiracy (1921), § 27, p. 64, and § 37, p. 88. But in any event the answer to Hawkins with his Year Book authority, as a basis for a decision by the Supreme Court of the United States in 1960 construing a statute enacted in 1948, was definitively made long ago by Mr. Justice Holmes:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, Collected Legal Papers, 187 (1920), reprinting The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

For this Court now to act on Hawkins's formulation of the medieval view that husband and wife "are esteemed but as one Person in Law, and are presumed to have but one Will" would indeed be "blind imitation of the past."

It would require us to disregard the vast changes in the status of woman—the extension of her rights and correlative duties—whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country.

How far removed we were even nearly a century ago when Congress passed the original statute against criminal conspiracy, the Act of March 2, 1867, 14 Stat. 484, from the legal and social climate of eighteenth century common law regarding the status of woman is pithily illustrated by recalling the self-deluding romanticism of Blackstone, whereby he could conscientiously maintain that "even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England." Blackstone, Commentaries on the Laws of England (1765), Bk. I, ch. 15, p. 433. It would be an idle parade of learning to document the statement that these common-law disabilities were extensively swept away in our different state of society, both by legislation and adjudication, long before the originating conspiracy Act of 1867 was passed. Suffice it to say that we cannot infuse into the conspiracy statute a fictitious attribution to Congress of regard for the medieval notion of woman's submissiveness to the benevolent coercive powers of a husband in order to relieve her of her obligation of obedience to an unqualifiedly expressed Act of Congress by regarding her as a person whose legal personality is merged in that of her husband making the two one.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 14.—October Term, 1959.

United States, Appellant, v. Lucille Aldine Degé, et al. } On Appeal From the United States District Court for the Southern District of California.

[June 27, 1960.]

Mr. Chief Justice Warren, with whom Mr. Justice Black and Mr. Justice Whittaker join, dissenting.

If the Court's opinion reflects all that there is to this case, it is astonishing that it has taken so many years for the federal judiciary to loose itself from the medieval chains of the husband-wife conspiracy doctrine. The problem, as the Court sees it, is almost absurdly uncomplicated: The basis for the notion that husband and wife are not subject to a conspiracy charge is that man and wife are one; but we know that man and wife are two, not one; therefore, there is no basis for the notion that husband and wife are not subject to a conspiracy charge. I submit that this simplistic an approach will not do.

The Court apparently does not assert that if the husband-wife conspiracy doctrine was widely accepted when the conspiracy statute was passed in 1867, 14 Stat. 484, and therefore was presumably within Congress' understanding of the reach of that statute, nonetheless this Court should now reject the rule because it finds it nonsensical. Instead, the Court's position is that

> "It would be an idle parade of learning to document the statement that these common-law disabilities [of women] were extensively swept away in our different state of society, both by legislation and adjudication, long before the originating conspiracy Act of 1867 was passed."

But, however rapidly nineteenth century jurisprudence moved toward a recognition of the individuality of women in other areas, it is wholly inaccurate to imply that the law of conspiracy changed apace. In fact, the earliest case repudiating the husband-wife doctrine which the Government has been able to cite is *Dalton* v. *People*, 68 Colo. 44, which was decided, as the Government puts it, "[a]s early as 1920." And if the doctrine is an anachronism today, as the Court says, its unusual hardiness is demonstrated by the fact that the decision of the Court represents a departure from the general rule which prevails today in the English-speaking world. As recently as 1957, the Privy Council approved the husband-wife doctrine,[1] and other Commonwealth courts are in accord.[2] For American decisions, see Annot., 4 A. L. R. 266, 71 A. L. R. 1116, 46 A. L. R. 2d 1275.

Thus it seems clear that if the 1867 statute is to be construed to reflect Congress' intent as it was in 1867, the Court's decision is erroneous. And I believe that we must focus upon that intent, inasmuch as there is no indication that Congress meant to change the law by the 1948 legislation which re-enacted without material variation the old conspiracy statute.[3] Surely when a rule of law is well-established in the common law and is part of the legislative purpose when a relevant statute is passed, that rule should not be rejected by this Court in the absence of an explicit subsequent repudiation of it by Congress.[4]

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[1] *Mawji* v. *R.*, 41 Crim. App. Rep. 69, 1 All Eng. Rep. 385.

[2] See *Kowbel* v. *The Queen*, 110 Can. Crim. Cas. 47 (1954); *R.* v. *McKechie* [1926] N. Z. L. R. 1.

[3] 18 U. S. C. § 371.

[4] "There are no judgments in Canada, dealing with this particular matter, but I think it is well settled that since many centuries, it has been the law of England that a husband and wife cannot alone conspire to commit an indictable offence. These views have been expressed during over six centuries, and I would be slow to believe

Consequently, I would be compelled to dissent whether or not I believed the rule to be supported by reason.

But more, I cannot agree that the rule is without justification. Inasmuch as Mr. Justice Holmes' observation that it is "revolting" to follow a doctrine only "from blind imitation of the past" is hardly novel, the tenacious adherence of the judiciary to the husband-wife conspiracy doctrine indicates to me that the rule may be predicated upon underlying policies unconnected with problems of women's suffrage or capacity to sue. The "definitive answer" to the question posed by this case is not to be found in a breezy aphorism from the collected papers of Mr. Justice Holmes, for "[g]eneral propositions do not decide concrete cases."[5]

It is not necessary to be wedded to fictions to approve the husband-wife conspiracy doctrine, for one of the dangers which that doctrine averts is the prosecution and conviction of persons for "conspiracies" which Congress never meant to be included within the statute. A wife, simply by virtue of the intimate life she shares with her husband, might easily perform acts that would technically be sufficient to involve her in a criminal conspiracy with him, but which might be far removed from the arms-

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that the hesitations of a few modern writers could justify us to brush aside what has always been considered as the existing law . . . . It may very well be amended by legislative intervention, but as long as it is not, it must be applied." *Kowbel* v. *The Queen*, 110 Can. Crim. Cas. 47, 52 (1954). (Taschereau, J.)

"Had it been the intention of Parliament to abolish the common law defence with which we are concerned it would be expected that plain words dealing expressly with such defence would have been used . . . . I can find nothing in the general words [of the statute] to warrant imputing to Parliament the intention of taking away this ancient common law defence of a husband and wife . . . ." *Id.*, at 54–55. (Fauteux, J.)

[5] *Lochner* v. *New York*, 198 U. S. 45, 76 (dissenting opinion).

length agreement typical of that crime. It is not a medieval mental quirk or an attitude "unnourished by sense" to believe that husbands and wives should not be subjected to such a risk, or that such a possibility should not be permitted to endanger the confidentiality of the marriage relationship. While it is easy enough to ridicule Hawkins' pronouncement in Pleas of the Crown [*] from a metaphysical point of view, the concept of the "oneness" of a married couple may reflect an abiding belief that the communion between husband and wife is such that their actions are not always to be regarded by the criminal law as if there were no marriage.

By making inroads in the name of law enforcement into the protection which Congress has afforded to the marriage relationship, the Court today continues in the path charted by the recent decision in *Wyatt* v. *United States*, 362 U. S. ——, where the Court held that, under the circumstances of that case, a wife could be compelled to testify against her husband over her objection. One need not waiver in his belief in virile law enforcement to insist that there are other things in American life which are also of great importance, and to which even law enforcement must accommodate itself. One of these is the solidarity and the confidential relationship of marriage. The Court's opinion dogmatically asserts that the husband-wife conspiracy doctrine does not in fact protect this relationship, and that hence the doctrine "enthrone[s] an unreality into a rule of law." I am not easily persuaded that a rule accepted by so many people for so many centuries can be so lightly dismissed. But in any event, I submit that the power to depose belongs to Congress, not to this Court. I dissent.

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[*] Hawkins, 1 Pleas of the Crown (6th ed. 1777), 351.